Supreme Court, U.S.
FILED
JAN 29 1999
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No. 98-1045

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CHRISTOPHER ARTUZ, Superintendent,

Petitioner,

v.

ADALBERTO FERNANDEZ,

Respondent;

DANIEL SENKOWSKI, Superintendent,

Petitioner,

v.

TIMOTHY KIRBY,

Respondent.

BRIEF IN OPPOSITION

Mr. Timothy Kirby
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Facility
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REASONS FOR DENYING THE WRIT

The state's first question presented is at best a question of form and not substance, and is plainly not a matter upon which certiorari should be granted. The state fastens upon the peculiarities of a summary order used by the Second Circuit to remand some of the hundreds of appeals pending in the wake of Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997), see Petition at 8, and argues that the failure of the court to grant a certificate of appealability, instead of remanding summarily and denying the request for a certificate as moot, was error that requires this Court's plenary consideration. The "error," if there was one, was plainly harmless, however, for the Court of Appeals implicitly found that the prerequisites for a certificate were met by remanding in light of Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998).

For the Circuit to issue a certificate, it had to find that the habeas petitioner had made a "substantial showing of the denial of a constitutional right." In the Ross case, which considered the same issue raised by Respondent Timothy Kirby on his appeal in the Second Circuit, Judge Kearse specifically found that habeas petitioners had a constitutional right to a reasonable time in which to file their habeas petitions after enactment of the AEDPA and determined that one year was the reasonable time required. 150 F.3d at 100, 103. Thus, the holding in Ross established that there was not only a "substantial" constitutional question in the case, but a meritorious one. By remanding in light of Ross, the Circuit

plainly incorporated this finding, and implicitly granted the certificate.

Certiorari should be denied for two other reasons. First, the state waived this formal error by not objecting to it before the Second Circuit. Had the state done so, the Circuit would certainly have granted the certificate and then remanded in light of Ross. Second, even if this Court grants certiorari, on remand, the Second Circuit will simply be able to grant the certificate and the case will proceed as it is. The state's claim is frivolous.

The state's second ground is equally frivolous. Every circuit to consider the question has agreed with the Second Circuit in Ross v. Artuz, supra, that the required grace period for filing a petition of habeas corpus after enactment of the AEDPA was one year. Petitioner admits this. Petition at 15-16. Not only is the opinion on this issue unanimous among the Circuits, but it is clearly correct. Judge Kearse's well-reasoned opinion in Ross demonstrates that there was no error in the court below, and no basis for this Court to grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

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